85-2017

Supreme Court, U.S.
FILED
MAY 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOSEPH GIOVANIELLO,

PETITIONER,

V.

BOARD OF DIRECTORS CENTENNIAL INDUSTRIES, INC.,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Joseph Giovaniello - Pro Se
6 Capitol Avenue
Williston Park, N.Y. 11596
Home (516) 742-4905
Business (516) 222-2000 Ext. 346

Questions Presented For Review

In the matter of Petitioner's lodging an ADEA (age discrimination) complaint:

1) Whether the Petitioner's two pivotal documented, Appendix C, and Appendix D, issues of fact unavailable to the district court, are substantial and evidentiary.

2) Whether this factual data should have moved the Second Circuit to abate the appeal and remand the case to district court.

In the matter of Petitioner's lodging a breach of implied contract complaint:

Whether the Petitioner's complaint documented, Appendix D, issues of fact, on which the District court did not rule, nor did the Second Circuit Rule, should be cause to review the judgement (lack of) of the courts.

PREFIX

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NO. _____

JOSEPH GIOVANIELLO,

PETITIONER,

V.

BOARD OF DIRECTORS CENTENNIAL INDUSTRIES, INC.,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Joseph Giovaniello, respectfully prays that a writ of certiorari issue to review the judgement of the United

States Court of Appeals for the Second Circuit entered on February 13, 1986.

OPINION BELOW

The Court of Appeals entered on February 13, 1986 its order denying the Petitioner's appeal from the grant by the district court for summary judgement. A copy of the order is atached as Appendix A.

The Court denied Petitioner's motion for reconsideration and rehearing on April 14, 1986. A copy of the order is attached as Appendix B.

JURISDICTION

On February 13, 1986 the Court of Appeals entered judgement affirming the grant by the district court of defendant's motion for summary judgement on the claim of this Petitioner, under the Age Discrimination in Employment Act. (App. A).

On April 4, 1986 the Court of Appeals denied Petitioner's motion for reconsideration and hearing. (App. B).

The jurisdiction of this court is invoked under Section 621 of Volume 29, United States Code.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution ADEA, Sec. 2 (B)

"It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

STATEMENT OF THE CASE

On February 13, 1986 a panel of the Second Circuit Court of Appeals affirmed the grant by the United States District Court for the Southern District of New York of defendant's motion for Summary Judgement on Plaintiff's claim under the Age Discrimination in Employment Act ("ADEA") 29, U.S.C. ss 621-634 (1982). A petition for rehearing was filed, and the petition was denied on April 4, 1986.

REASON FOR GRANTING THE WRIT

The district court in its June 21, 1985 memorandum and order, Appendix E*, states that "Summary Judgement will not be denied merely because of conclusory allegations or denials made by the opposing party."

*NOTE: This Reference E, and all through Ref. N, are not included in this petition as they are part of lower court record.

Further, the District Court Judge in his June 21, 1985 memorandum and order (App. E) stated that the Plaintiff sought unsuccessfully to have the defendant expand his responsibilities and duties (as an argument to demonstrate the issue of pretext). In point of fact the Plaintiff sought, respecting responsibilities and duties, to have the defendant restore this Petitioner's responsibilities and duties to the level resembling that existing in my staff years 1948 through 1973.

The application erroneously, by the District Judge, of the use of the word expand, as distinguished from restore is critical because it demonstrates that the judge has accepted Centennial's defense that "there was nothing for Giovaniello to do," when in fact that absolutely was not the case. Centennial in this regard, was totally unable to argue this Petitioner's role in the organization for 34 1/2 years, (App. F). Centennial was totally unable to

argue this Petitioner's role in the organization during the last five work days, stating only that "it took no more than 15 minutes each day to do the job," Appendix G, yet it was totally unable to argue the application of those fifteen minutes each day to the duties outlined for those five days by this Petitioner.

This Petitioner's background in a career spanning 34 1/2 years, (App. F) clearly established his Bona Fide Occupational Qualification. Centennial is so concerned respecting BFOQ and the fact that pretext exists, that it created an issue of qualification by willfully misinforming the district court and court of Appeals, stating, Appendix M, that a Certified Public Accountancy credential held by a staff associate retired in 1982 at age 67 made it possible for that associate to retain staff status for 35 years until his retirement. In point of fact that staff associate held no such

credential and is attested to by separate official documents from the states of New York and New Jersey (App. C). This fact it must be noted, was not available to the district court at the time the District Judge rendered his June 21, 1985 memorandum order, and hence may have affected his perception of the facts.

Moreover, the Defendant states, Appendix I, that this Petitioner was doing "strictly a clerical job." Yet Centennial is totally unable to argue existing of evidence, Appendix J, that Giovaniello was in fact the Assistant Treasurer.

Further, the Defendant states that a 1978 bankruptcy declaration devasated the organization, reducing the number of divisions from seventeen to three. This is irrelevant. In point of fact, fourteen divisions acquired principally during the years 1972-1975 were various companies essentially unsuccessful, some warehousing entities, and some smaller retail type

entities. With a core group of three successful base companies, one of which was organized in 1879, Centennial, with this petitioner, an established staff member thoroughly experienced in the general ledger and other related work since 1948, encountered difficult marketing problems precipitating voluntary bankruptcy. The Defendant would have the court believe that this Petitioner's career began in 1973. This is not so, the starting year of employment on Centennial's staff was 1948.

The designation, division, was bank imposed to protect own measure of security interest and was not akin for example to the General Motors Corp. and its Cadillac, Oldsmobile, Buick, etc. divisional scope or its import. Centennial emerged from its bankruptcy fiscally stronger than ever before in its 105 year history and my effort helped its 1979-1982 restoration to its good name existing during my years 1948-1972. Evidence as to my contribution

to that effort is submitted as (App. D), a positive evaluation letter signed by the corporate Board Chairman. Centennial is totaly unable to argue this evidence. This is why the bankruptcy defense must be viewed as the pretext for termination that it is.

Unquestionably, it is in this context that it must be stressed that Centennial did replace Giovaniello when reorganizing its holding company staff, removing this Petitioner, retaining three considerably younger staff people, one of whom a staff member for just 1 1/2 years, was just 28 years of age. Therefore, as found in the ADEA violation in the Carpenter v. Trailways decision, describing the amount of evidence needed to make out a case; "A finding that age was one of the determinative factors may be inferred from the totality of the circumstances." Hence, it must be noted that in light of all of the above, that the Court of Appeals for the

Second Circuit was in error in determining that no one replaced Giovaniello. And the Circuit Court erred perceptually in its equating Centennial's new banking arrangement with the elimination of work done by Giovaniello, or the work which Giovaniello was qualified to do.

Moreover this Petitioner has steadfastly argued that there is unquestionably a breach of implied contract resulting from Centennial's increasing, in April 1982, my salary to $28,000. This was followed in less than a year, in March 1983 by an abrupt termination, after 34 1/2 years of service. The corporate manual, Appendix N, expressly refers to relocating affected personnel. Centennial has been totally unable to argue this evidence. Centennial has been totally unable to produce any written negative evaluations respecting my entire 34 1/2 year career, or to produce any evidence respecting my inability to handle any corporate office challenge.

CONCLUSION

For the foregoing reasons, Petitioner, Joseph Giovaniello, respectfully requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted,

Joseph Giovaniello

Joseph Giovaniello
6 Capitol Avenue
Williston Park, N.Y. 11596
Home 516 742-4905
Business 516 222-2000, Ext. 346

Subscribed and Sworn to Before Me this 4th of June 1986

Notary Public

JOSEPH J. GANIRO
Notary Public, State of New York
No. 30-4513323
Qualified in Nassau County
Commission Expires March 30, 1987

JOSEPH A. GIOVANIELLO,	)	In The
Plaintiff-Appellant,	)	United States
	)	Court of Appeals
v.	)	For the
	)	Second Circuit
CENTENNIAL INDUSTRIES,	)	
INC., BOARD OF DIRECTORS,	)	
Defendants-Appellees	)	

ORDER

Joseph Giovaniello, pro se, appeals the grant, by the United States District Court for the Southern District of New York, Peter K. Leisure, Judge, of defendants' motion for summary judgment on his claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621-634 (1982). We affirm.

Giovaniello worked for Centennial Industries from December 22, 1948, until his termination in March, 1983, at the age of

fifty-seven. According to appellees, beginning in 1974 Centennial experienced economic difficulties, culminating in the company's filing a Chapter XI voluntary bankruptcy petition in September, 1978. A corporate reorganization followed; by 1983 there had been a significant reduction in the number of operating divisions and corporate staff personnel. Moreover, in 1982, the company entered a new banking services arrangement, whereby its bank performed services formerly performed by Giovaniello, who had managed Centennial's cash flow. The company decided, given appellant's decreased workload, to terminate him. He was given severance pay. No one was hired to replace him.

Giovaniello filed an age discrimination charge against Centennial with the Equal Employment Opportunity Commission ("EEOC"). When the EEOC informed Giovanielo that no

further action would be taken on his behalf, he commenced this action.

In an ADEA suit, plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. The burden then shifts to the employer to proffer a legitimate, nondiscriminatory reason for the challenged action. If the employer produces such evidence, the plaintiff then must establish by a preponderance of the evidence that the reasons offered for the action were merely a pretext. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (Title VII); Pena v. Brattleboro Retreat, 702 F.2d 322, 323-24 (2d Cir. 1983) (holding Burdine standards applicable in ADEA cases).

Here, assuming for the sake of argument that Giovaniello's allegations made out a prima facie case, Centennial met that case with ample evidence of the legitimate

business reasons that led to Giovaniello's discharge. Giovaniello, in response, offered nothing that would tend to show that Centennial's reasons were merely a pretext for a discriminatory discharge. A party may not "defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars ...," Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 106 S. Ct. 91 (1985). That being the case, disposition on summary judgment was proper.

Judgment affirmed.

/s/ James L. Oakes

/s/ Ralph K. Winter

/s/ Roger J. Miner

Circuit Judges

Date: February 13, 1986

JOSEPH GIOVANIELLO,	)	In the
Plaintiff	)	United States
	)	Court of Appeals
V.	)	for the
	)	Second Circuit
CENTENNIAL INDUSTRIES,	)	Notice of Motion
INC., BOARD OF DIRECTORS,	)	1. Leave of Court to
Defendants	)	file for Reconsider-
	)	ation and Rehearing
	)	2. Reconsideration/
	)	Rehearing
	)	Docket No. 85-7683

ORDER

It is hereby ordered that the motion be and it hereby is denied.

/s/ James L. Oakes

Chief Judge

April 4, 1986

Appendix B

State of New Jersey

Board of Accountancy

1100 Raymond Blvd.

Newark, New Jersey 07102

Room 507-A

201 648-3240

March 13, 1986

This is to certify that William C. Harris is not licensed by this Board as a CPA or Public Accountant.

Sincerely Yours,

NEW JERSEY STATE BOARD

OF ACCOUNTANCY

John J. Mead

Executive Secretary

Appendix C-1

STATE OF NEW YORK)
ss.:
COUNTY OF ALBANY)

I, David Fribourg, Head Clerk, Division of Professional Licensing Services of the New York State Educational Department, do hereby state that, as Head Clerk of said Division, I have legal custody of the official records of the Division of Professional Licensing Services of the New York State Education Department, and that a diligent search of the records of my office has been made and there has been found no record of entry of the name of WILLIAM C. HARRIS as having received a CERTTIFIED PUBLIC ACCOUNTANT license from the New York State Education Department.

Witness my hand and the seal of the New York State Education Department this 19th day of March, 1986.

/s/ David Fribourg
Head Clerk, Prof. Lic. Svc

Appendix C-2

BIDDLE PURCHASING COMPANY - NEW YORK

August 4, 1969

Home Federal Savings & Loan Assn.
70-01 Forest Ave. Nr. Myrtle Ave.
Ridgewood, Queens, N.Y.

Re: Joseph Giovaniello

Gentlemen:

The subject has been an employee of the Biddle Purchasing Co.*, as Manager of the General Ledger Accounting Department since December 22nd, 1948.

Mr. Giovaniello is in full charge of our General Ledger Accounts and during the year 1968 earned $10,453.43.

Through June 30th of 1969 he has earned $5,630.70.

Mr. Giovaniello is a responsible and respected employee who has excellent prospects for future progress and we are happy to commend him to your favorable consideration.

Appendix D-1

*Name of company prior to 1972 name change to Centennial Industries, Inc.

Very truly yours,

/s/ JFC

Chairman of the Board

Appendix D-2

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OCTOBER TERM 1985

JOSEPH GIOVANIELLO,

PETITIONER,

V.

BOARD OF DIRECTORS CENTENNIAL INDUSTRIES, INC.,

RESPONDENT,

PROOF OF SERVICE

STATE OF NEW YORK>
S.S.
COUNTY OF NASSAU>

Joseph Giovaniello, PRO SE, after being duly sworn, deposes and says that pursuant to Rule 21.4 (A) of this court he served the within petition for writ of certiorari to the

Court of Appeals for the Second Circuit on Counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Paul, Weiss, Rifkind,
Wharton & Garrison
Attorneys for Defendants
345 Park Avenue
New York, New York 10154

and depositing same in the United States at Long Island, New York on June 5, 1986.

Joseph Giovaniello

Joseph Giovaniello, Affiant

Subscribed and Sworn to Before Me this 5th of June 1986

Notary Public

JOSEPH J. GANIRO
Notary Public, State of New York
No. 30-4513323
Qualified in Nassau County
Commission Expires March 30, 1987